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No. 00-131

Supreme Court, U.S.
FILED
OCT 25 2000
CLERK

IN THE
Supreme Court of the United States

K.D.M., a minor, by and through his father and next friend, W.J.M.,
Petitioner,

v.

REEDSPORT SCHOOL DISTRICT and STAN BUNN, in his official capacity as Oregon Superintendent of Public Instruction,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY

Introduction

This case presents the question whether the Free Exercise and Equal Protection Clauses prohibit government discrimination on the basis of religion in the specific context of a government program providing special education services to disabled children. In the Petition for Certiorari, we showed that this question is an important and recurring one that has arisen throughout the nation in a variety of factual contexts (Pet. 11-16, 20-21). The State Respondent's Brief in Opposition ("Opp.") does not appear to disagree.[1] Stripped of its formulaic catch phrases—Respondent asserts, *e.g.*, that Petitioner's claims are "fact-bound" (Opp. 8), and that the alleged split is "more apparent than real" (Opp. 11)—Respondent's brief effectively concedes that the decision and reasoning of the Ninth Circuit conflicts with the decision of the Eighth Circuit in a case involving similar facts, *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), and also with those of the Sixth and Third Circuits. *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846 (3d Cir. 1994).[2] As Respondent puts it, "[a]n examination of those decisions, admittedly, may reveal some analytical tension between them" (Opp. 8). "Some analytical tension" is a decided understatement.

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[1] Respondent Reedsport School District filed its own Brief in Opposition (Dist. Opp.). Because the District has, for the most part, merely incorporated by reference the State's arguments, this Reply focuses on the State Respondent's Brief in Opposition, except where specifically noted.

[2] Respondent also recognizes the tension between the decision below and this Court's decisions in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618 (1978). (Opp. 10-11).

Having conceded a conflict, the State Respondent advances two arguments against certiorari: *first,* Respondent insists that this case "will soon be moot" (Opp. 11); and *second,* Respondent contends that this case is too "fact-bound" (Opp. 8) to serve as a vehicle for resolving the admitted conflict among the Circuits on the important constitutional questions raised in the Petition. Neither argument has much substance.

I.

Respondent suggests that the case "is on the verge of becoming moot" (Opp. 12), in light of a contemplated change in the state's regulation (Opp. 11-14). This suggestion is wrong. Even a repeal of the state's regulation would not moot Petitioner's claims *against the Reedsport School District,* the other Respondent in this case,[3] just as a similar mid-litigation regulatory change did not moot the claims in *Peter v. Wedl. See* 155 F.3d at 995-996 (noting change in rule), *on remand, Westendorp v. Indep. Sch. Dist. No. 273,* 35 F. Supp. 2d 1134 (D. Minn. 1998) (awarding "retrospective equitable relief" in light of school district's past denial of special educational services). Here, as in *Peter,* Petitioner ultimately seeks relief against the District. This relief may include, for example, compensatory provision of on-site special services for the number of years that such services were unlawfully denied in the past. *See Westendorp,* 35 F. Supp. 2d at 1138 (ordering six years of on-site special education services at child's religious school as remedy for six years of unlawful denial of such services).[4]

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[3] In its Brief in Opposition, the District stated that its policy and practice was to "follow the rules promulgated by the State Department of Education relating to delivery of services . . . in the case of K.D.M." (Dist. Opp. 1).

[4] *See generally Florence County Sch. Dist. v. Carter,* 510 U.S. 7, 12-16 (1993) (awarding compensatory remedy for wrongful denial of special education); *Burlington School Committee v. Department of Education,*

Thus, even if the State were to change its administrative rule and, indeed, even if the District then changed its own policy and practice *prospectively*, such doubly-contingent changes would not moot the school district's past unconstitutional discrimination, nor would it moot Petitioner's claims for relief for such past violations. All a change in the state's regulations would mean is that the District could no longer defend its religion-based denial of on-site special education services to Kai Moore by insisting that state law required such discrimination. But this was never much of a defense -- state law cannot justify a violation of the Constitution, U.S. Const. art. VI, sec. 2—and, in any event, the District's loss of an asserted state law justification for its practices would not moot Petitioner's federal constitutional claims for relief against the District.

It is noteworthy that the District's Brief in Opposition does not include any commitment to a change in policy, in the event that the State does repeal its rule (*See* Dist. Opp. 1). Nor has the District—the party actually responsible for providing special education services to Kai—committed to providing full compensatory relief (as in *Peter, supra*). In short, the State Respondent's assurances notwithstanding, this case can only become moot if *both* Respondents agree to provide Petitioner with the relief to which he may be entitled, or if the parties reach a settlement. And this does not appear to be in the cards. *Compare Piscataway Tp. Bd. of Educ. v. Taxman*, 522 U.S. 1010 (Mem) (1997) (dismissing writ of certiorari after parties reached settlement).

In sum, this case is *not* moot. The issue of religion-based discrimination in the administration of government programs remains perfectly framed by the facts of this case: The

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471 U.S. 359, 369-371 (1985) (same); *cf. Milliken v. Bradley*, 433 U.S. 267, 281-284 (1977) (*Milliken II*) (discretion to fashion remedies tailored to rectifying past constitutional violations).

Reedsport School District has refused to provide Kai Moore with "a vision specialist . . . in his classroom . . . because [his school] is a sectarian religious school." Stipulated Facts, para. 6 (Opp.-App. 2); *see also id.* at para. 12 ("The District is not providing the services of a vision specialist . . . because the School District and the State of Oregon believe the setting is not religiously-neutral.") (Opp.-App. 4).[5] This is, as everyone admits, the *only* reason that on-site disability services were denied to Kai. Notwithstanding Respondent's claim that the State plans to repeal its unconstitutional rule (Opp. 11-12), this case provides an excellent, straightforward vehicle for resolving an important constitutional question on which the lower federal courts are badly divided.[6]

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[5] Respondent devotes several pages to a discussion of other reasons why a school district in Oregon might, at its discretion, deny on-site disability services to all private school children. But it does not matter whether other school districts have policies of not providing on-site special education at any private school (Opp. 3-6), because that has not been the Reedsport School District's policy and was never the reason given for its refusal to provide on-site services to Kai Moore. The reason the District has denied such services—the only reason—is because of the religious nature of the school. Stipulation of Facts, paras. 6, 12 (Opp.-App. 2, 4); *see also* Dist. Opp. 1.

Respondent also makes the strange suggestion (Opp. 1-2) that this case turns on whether special education services occur in Kai's regular classroom at Harbor Baptist, or in a separate classroom at Harbor Baptist. In this case, however, the parties stipulated that the reason why Kai would not be provided with on-premises special education was *because of the religious nature of the school.* Nothing in the record suggests that the District refused to provide on-premises special education at Harbor Baptist because Kai's family wished it to be in one classroom of the school rather than another.

[6] The case for review is not undermined by Respondent's assurances that the state rule in question could soon be repealed. As we show in this Reply, this case is not moot, nor is it "on the verge" of becoming moot (Opp. 12). Even if the state's rule were repealed—and, this being a democracy, Respondent cannot guarantee that it will be—this remains a live and important constitutional case. Repeal of the offending rule would

II.

This leaves only the State Respondent's observation that this case has distinctive facts, somewhat different from those in *Peter, Hartmann, and Brown* (Opp. 6-11). Indeed it does.[7] But any differences in factual details do not make this case an improper vehicle for addressing the important, common constitutional question addressed in all of these cases: Does the denial of a government benefit to an otherwise-eligible recipient, on the basis of religion, violate the Free Exercise and Equal Protection Clauses?

As Respondent observes, the court below upheld a challenge to a state law that discriminates on the basis of religion, on the ground that any burden imposed by the discrimination was merely "*de minimis*" (Opp. 9). But this Court's precedents clearly teach that discrimination on the

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do nothing to prevent future discrimination or to undo the error and confusion caused by the decision below. What is more, it is clear that government entities cannot avoid review of unconstitutional practices and policies merely by hinting in briefs that they plan to mend their ways in the future. *Cf.* St. Augustine, CONFESSIONS 169 (R.S. Pine-Coffin trans., 1961) ("I had prayed to you for chastity and said, 'Give me chastity and continence, but not yet.'"). Were it otherwise, such entities would have little incentive not to "return to [their] old ways." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n. 10 (1982). Given the timing of Respondent's assurances, and the fact that the conflict between the rule in question and controlling case law has been apparent for years, promises about the future conduct of legislative bodies should be accorded little weight. *See United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952) (noting this Court's wariness of such "protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption").

[7] *See, e.g., Khan v. State Oil Co.*, 93 F.3d 1358, 1362 (7th Cir. 1996) (Posner, J.) ("It is not cricket to distinguish a precedent by pointing to a fact mentioned by the court in the previous opinion but clearly given no weight by it. Otherwise, no precedents would have any force, for no two cases are exactly alike."), *vacated on other grounds, State Oil Co. v. Khan*, 622 U.S. 3 (1997).

basis of religion in the administration of government benefit programs is unconstitutional, *period*, unless justified by a compelling state interest (Pet. 16-20) -- a one-penny tax levied on all Presbyterians would impose only *de minimis* burdens, but would obviously violate the First Amendment. As we established in the Petition, the decision of the court below to the contrary conflicts squarely with the decisions of several other Circuits (Pet. 11-16).

Respondent's efforts to explain away the conflict, by noting the unremarkable fact that the various courts' decisions involve "different fact patterns" (Opp. 9), are unconvincing. Respondent asserts that the decisions in *Peter* and *Hartmann* turned on their differing fact patterns. With respect to *Peter*, though, Respondent admits that the school district in that case "refused to provide the services . . . at the child's religious school," but provided the services to children who were educated in a "neutral site" (Opp. 9). Concerning *Hartmann*, Respondent concedes that "the Army in fact treated day-care providers who included some religious practices differently from those who did not" (Opp. 10). Here, the Reedsport School District treated Kai Moore differently than it treated other special needs children, solely because he attended a religious school. It is the legal analysis employed in *Peter* and *Hartmann*, and not these cases' facts, that conflicts with the decision below. *See* Pet.-App. 17a-19a (Kleinfeld, J., dissenting) (noting conflict between the decision of the court below, on the one hand, and those in *Hartmann*, *Brown*, and *Peter*, on the other).

Similarly, Respondent's claim that *Brown* "is strikingly dissimilar to this case" (Opp. 10) is not persuasive. Yes, *Brown* arose in a different factual context. Still, the Third Circuit held that a plaintiff need not demonstrate a substantial burden when challenging a law that specifically targets or discriminates against religion. 35 F.3d at 849-850 ("The rare cases which address acts or laws which target religious

activity have never limited liability to instances where a 'substantial burden' was proved by the plaintiff. . . . Applying such a burden to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment.") (citation omitted). The Ninth Circuit below held otherwise (Pet.-App.9a-11a). And the Third Circuit both considered and rejected the proposition that *de minimis* burdens on religion insulate discriminatory state action from First Amendment scrutiny.[8] But the Ninth Circuit ruled otherwise. Pet.-App. 10a; *see also* Pet.-App. 22a (Kleinfeld, J., dissenting) ("[T]here is no such thing as a *de minimis* exception to the Free Exercise Clause.").[9]

In sum, this case does not involve the "fact-bound" application of settled law. Rather, the court below, in contrast with other federal courts, applied the wrong standard and reached the wrong result. That is, the question here is not whether the court below mis-applied the right rule -- *i.e.*, the

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[8] Contrary to Respondent's suggestion, the "impact" on religion (Opp. 10) in *Brown* could also fairly be said to have been *de minimis*: The Borough erected and locked a gate between a public park and property which was to be used by the plaintiffs for entering and exiting their religious tent revival meetings. The plaintiffs only had to walk an extra few hundred feet to get around the locked gate and enter or exit the tent meeting. *Brown*, 35 F.3d at 848. Indeed, the district court had rejected the First Amendment claim because the plaintiffs had not demonstrated that the extra walk was a "substantial burden" on their free-exercise rights. *Id.* at 847.

[9] Respondent's efforts to avoid the force of this Court's decisions in *Lukumi* and *McDaniel* are unconvincing (Opp. 10-11). The key to these cases, as Justice Brennan put it in *McDaniel*, is the principle that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." 435 U.S. at 639 (Brennan, J., concurring). Whether government discrimination forces a minister to give up his vocation, or denies a disabled child special-education services at his religious school, it is discrimination—and it is unconstitutional—just the same.

rule that the Free Exercise and Equal Protection Clauses do not permit religious discrimination in the administration of government benefit programs, unless that discrimination is justified by a compelling state interest -- but a case where the court below departed from the correct rule, and where review is needed to correct both a legal error and a constitutional law conflict.

CONCLUSION

For all these reasons, and for the reasons set out in the Petition for Certiorari, we urge this Court to grant the Petition.

Respectfully submitted,

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